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No. 94-361

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

HELEN BYBEE,

*Petitioner,*

v.

PROCTOR HOSPITAL,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

ROY G. DAVIS
*(Counsel of Record)*
KECK, MAHIN & CATE
331 Fulton Street
Suite 640
Peoria, Illinois 61602
(309) 673-1681
*Attorneys for Respondent*

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court or the Court of Appeals misapplied *St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S.Ct. 2742 (1993).
2. Whether the Court of Appeals erred in affirming the factual findings of the District Court.
3. Whether the Petitioner has misconstrued the decisions of the District Court and the Court of Appeals so as to create issues where none exist.

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## RESPONDENT'S[1] BRIEF IN OPPOSITION

### REASONS WHY THE CAUSE SHOULD NOT BE HEARD BY THIS COURT

"A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10. There are no special and important reasons for granting certiorari in this case. There is no split among the circuit courts of appeal as to any issue raised in this case. The decision of the Seventh Circuit does not conflict in any way with any decision of this Court nor does it de-

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[1] The parent corporation of Proctor Hospital is Proctor Health Care Incorporated. Its subsidiaries which are not wholly owned are Health Plus, Inc., Galena Park Nursing Home, and Galena Park Terrace.

part, or sanction a departure, from the accepted and usual course of judicial proceedings. This case does not involve an important question of federal law that has yet to be addressed by this Court. In short, this case does not merit further review.

## STATEMENT OF THE CASE

The Petitioner's Statement of the case is inaccurate and argumentative. The Respondent addresses the inaccuracies in that portion of its argument which responds to the Petitioner's various claims that the District Court's factual findings are erroneous.

The decisions of the District Court and the Court of Appeals contain factual statements of the case with which the Respondent agrees.

## SUMMARY OF ARGUMENT

The primary argument made by the Petitioner is that the District Court did not reach the factual conclusions she wanted based on the evidence that was presented. Contrary to her claims, the District Court did not exclude any evidence from the record and its decision was based on the entire record. Moreover, the Court of Appeals review of the District Court's findings of fact was conducted on the basis of the record in its entirety. While the Court of Appeals found that there was some evidence to support Petitioner's position, the appellate judges had "no definite and firm conviction that a mistake has been committed" in the factual findings. No issue raised by the Petitioner on this point is worthy of review by this Court.

The legal issues posed by the Petition would make for an interesting academic exercise. However, they are not presented for the Court's consideration on the record in this case.

Petitioner raises the "pretext plus" issue which is the subject of several current commentaries. Following this Court's decision in *St. Mary's Honor Center v. Hicks*, some commentators have speculated that a plaintiff must, in addition to proving the employer's nondiscriminatory explanation is a lie, offer direct evidence of discrimination. Petitioner claims she was victimized by the application of "pretext plus". The difficulty with her position is that the Court of Appeals squarely stated that it did not hold her to that standard. Consequently, her argument is merely academic.

Petitioner makes a similar abstract argument about the standard employed by the Court of Appeals to measure the sufficiency of the nondiscriminatory reason advanced by the Respondent in support of its actions. The Court of Appeals repeated the maxim that it is not the job of the federal courts to delve into the wisdom of the employer's personnel policies and practices. Petitioner, claiming there is a split in the circuits, cites to two courts of appeal decisions reversing district court holdings that the ADEA is not applicable to religious institutions. In each instance the district court was motivated to dismiss due to the fear of government entanglement with religion that would arguably arise from the factual consideration of whether an employer's proffered religious reason for a negative employment action was pretextual. In reversing, the appellate courts did not direct the district court to examine the plausibility or wisdom of the employer's proffered religious motive as the Petitioner contends. Rather, the direction on remand in each case was simply to determine whether the employer's stated purpose for the challenged action was its actual purpose. This is precisely the standard employed below and it is consistent with every decision of this Court on the same point.

In summary, the Petition should be denied.

## ARGUMENT

### I.

**The Petitioner failed to adduce sufficient evidence to persuade the District Court that the Respondent's decision to move her to the third shift was a pretext for age discrimination.**

While the Petitioner attempts to cast the issues she raises in this case as questions of law, her primary complaint is that the District Court found her evidence of pretext insufficient. She claims the District Court and Court of Appeals "completely ignored" the "unrebutted evidence." There was no unrebutted evidence of pretext. The District Court accurately disposed of her arguments when it held:

> "Her case is based on her perception without proof."

Her perceptions are set forth again in her Petition and represented to be unrebutted evidence of pretext. In each and every instance she is wrong.

---

**A. The absence of a corporate seniority policy is not evidence of pretext.**

Petitioner's supervisor selected her to move to the third shift because, from among the candidates, she had the shortest length of service with the Hospital. Petitioner argues that her supervisor's decision to use length of service with the Hospital as the selection criteria is a pretext for age discrimination. However, the courts recognize that seniority preferences based on total length of service with the employer, in contrast to departmental seniority, generally favor the older worker. See *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1162 (7th Cir. 1992). Total length of service with an employer, as a general rule, is a predictor of age.

Petitioner is correct when she says there was no corporate seniority policy. This is because the Hospital operates on a "decentralized management" philosophy. Subject to very few corporate policies, the Patient Care Coordinator for each unit within the Hospital is free to establish policies, including those relating to seniority and shift selection, which will yield the best patient care. The Hospital's Chief Executive Officer explained this style of management succinctly (R 37):

> Q. Did the hospital have a particular philosophy or management style with respect to the delegation of authority to its managers for decision-making?
>
> A. It is our policy to have management decisions made at the lowest level of management within the organization, usually at the department head level.
>
> Q. If the department head determines that she is going to move nurses based on hospital seniority, does that require your approval before she does that?
>
> A. No.

Under examination by Petitioner's attorney, the Hospital's Chief Operating Officer further explained (R 54):

> Q. And concerning decentralized management, that means that each nursing unit operates as an individual unit self-contained, is that correct?
>
> A. There could be variations on interpretation of that. "Self contained" meaning?
>
> Q. Well, they're responsible for the staffing of their units?
>
> A. Uh-huh, right.
>
> Q. And determining who works where?
>
> A. Right.

Q. And whether a person works on third shift or first shift?

A. Right.

Q. And how many people we need at first, second and third shift?

A. Right.

Q. And as far as the policy of determining who works where, whether the person works third shift or first shift, that is within the unit?

A. Right.

No witness offered any testimony contrary to the foregoing. It is undisputed that Susan Gulley, the Patient Care Co-ordinator for the unit where Petitioner worked, had total discretion in assigning shifts. The absence of a corporate seniority policy governing the assignment of shifts is not evidence of age bias nor is it suspicious on its face. In short, it is not evidence of pretext.

**B. Gulley's proposal to rearrange her staff is not evidence of pretext.**

Prior to the staffing change giving rise to this action, Gulley's unit generally had 3 RNs, 2 LPNs and a nurse aide on the day shift (7 AM - 3 PM). There were 3 RNs and no LPNs on the night shift (11 PM - 7 AM). (R 265-274) In Gulley's view, this mix of RNs and LPNs was out of balance because there were two LPNs on days and none on nights. The imbalance adversely impacted the work performed on the unit in two ways.

The first adverse impact has to do with the protocol for assigning nurses to patients. Because each patient requires a certain amount of care that only an RN can perform, RNs must also assume duties for patients otherwise cared for by an LPN. In practice, the Patient Care Coordinator divides

all of the patients between her nurses (RNs and LPNs) and then assigns RNs to patients who are cared for by an LPN. Thus, an RN must care for her patients and assume certain duties for the LPNs' assigned patients. The imbalance identified by Gulley was that the three RNs on the day shift had to cover their patient load as well as that of the two LPNs. By contrast, there were no LPNs on third shift and the three RNs had no LPNs to supervise or assist. (R 272-277)

The second adverse impact had to do with the decision of the Hospital and its physicians to begin scheduling a greater number of "same day" surgeries. Those are procedures conducted on the same day as admission. (While the petitioner criticizes the Hospital for not introducing documentary evidence of the increase of same-day admissions, the Hospital was under no obligation to do so. Gulley, as well as the Hospital Vice President of Nursing, testified that there was an increase in the number of same-day admissions due to third party payors seeking to reduce their medical costs. (R 263; McCoy 20)) In order to handle these same-day surgeries, the Hospital had to admit the patients very early, frequently before the 7 AM starting time of the day shift. (R 263-264) Because the patient was not in the Hospital the previous evening and night, a substantial amount of nursing work had to be done before the patient was sent to surgery. When the patient is first admitted, a portion of the nursing care is typically that for which an LPN is well suited and which does not require the attention of an RN. The patient must be placed in a room, acclimated to surroundings and have certain vital signs (such as temperature and blood pressure) recorded. This is commonly referred to as "hands on" nursing which an LPN can perform competently and efficiently. The principal job of the RN as it relates to the admission of same-day surgeries is to prepare the overall assessment and "patient care plan".

This is a function which the LPN cannot perform. (R 273) All of this work must be performed on the day of surgery before the patient can be sent to the operating room whereas it used to be performed on the day before surgery. Consequently, the surgical schedule is pushed back in the day. As a result, the patients return from surgery later in the day. Thus, the evening shift (3 pm - 11 pm) assumes greater responsibility for the post-operative care of same-day surgeries, and the increase in same-day surgeries proportionately increases the evening shift's workload. (R 264)

In order to correct the problems which she perceived in staffing, Gulley proposed to increase the number of evening shift nurses, and to switch one of the day shift LPNs to the night shift in exchange for a night shift RN. There is nothing pretextual about Gulley's decision to address her staffing problem.

**C. The decision to utilize length of service with the Hospital as the method for selecting the transferee was not pretextual.**

As explained above, the Hospital had no corporate seniority policy. When neither the Petitioner nor the other LPN on the day shift volunteered to move to the night shift, Gulley decided that she would utilize seniority to decide which one would make the move. In determining which type of seniority to use, she sought the counsel of the Vice President of Nursing. The Vice President of Nursing suggested to her that it made the most sense to use length of service with the Hospital as the criteria. Her rationale was that the Hospital encourages its employees to progress upward through education and training (*i.e.* from aide to LPN to RN) and also encourages employees to transfer voluntarily from unit to unit to fill vacancies which is a great convenience to the Hospital. To apply job or unit seniority

would, logically and consistent with this rationale, serve as a disincentive to this type of activity. In other words, employees would not progress from aide to LPN nor would they voluntarily move from an overstaffed unit to an understaffed one if they knew they would be adversely affected by a seniority rule based on time in the unit or time in a particular job. Gulley also conferred with the Hospital's Vice President of Personnel who agreed with this position. Gulley adopted their advice and told Petitioner that length of service with the Hospital would control. (McCoy 26-30; R 74-75, 107, 281)

There is nothing pretextual about Gulley's selection of length of service with the Hospital as the determinative factor in deciding who would move to the third shift.

**D. The Petitioner produced no evidence suggesting that a contrary seniority practice had been followed consistently in the past.**

Petitioner claims that on a prior occasion, some time in the early 1970's, she was allowed to claim a night shift opening on another floor through the use of unit seniority. According to Petitioner, her supervisor explained the seniority principle as follows:

> "Well, I guess you will have to be able to take it [the open position] because you have more seniority on the floor."

In addition to being remote in time, her evidence is equivocal at best.

Petitioner also adduced testimony that in another instance, length of Hospital service was invoked by a Patient Care Coordinator to resolve conflicting shift requests. (R 208-218) In short, she failed in her attempt to demonstrate that the use of Hospital service to compel her to

move to third shift was aberrational. She demonstrated merely that there was no uniform past practice. In other words, the testimony she produced is absolutely consistent with the Hospital's system of decentralized management which allows each Patient Care Coordinator to adopt the policies and practices which will produce the best patient care for the particular unit.

**E. Petitioner failed to prove age bias on the part of Gulley.**

In an attempt to prove that Gulley was biased against older people, Petitioner produced Gulley's predecessor, Shirley Suits, to testify. When Suits was removed from the Patient Care Coordinator position and replaced by Gulley, Suits sought to remain employed as a nurse on the unit. She admitted that having spent so many years in management, her clinical nursing skills were rusty and she would need to be reoriented. Specifically, Suits admitted that she did not know how to use the intravenous pumps or the feeding tube pumps that were used on the floor. (R 307) Suits alleges that when she asked Gulley whether or not Gulley would be willing to assist her, Gulley told her that she did not want to be her "crutch". (R 309) Contrary to any opinion Suits may have about the comment, it does not denote age bias. At best, it indicates that Gulley was unwilling to have Suits lean on her to supplement her lack of clinical skills. Additionally, Suits' testimony is not direct evidence of age discrimination. Stray remarks and statements unrelated to the decisional process itself do not constitute direct evidence. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S.Ct. 1775, 1804-5 (1989) (O'Connor, J., concurring in the judgment). In short, the incident to which Suits testified, even if entirely true, is neither direct evidence of discrimination nor sufficient to prove the Hospital's

reason for transferring Petitioner to the third shift was a mere pretext for age discrimination.

**F. Gulley's inability to achieve her plan exactly as she had outlined it is not evidence of pretext.**

When Petitioner refused to go to the open position on the night shift, Gulley sought an LPN to fill the opening. Her search for an LPN was unsuccessful. In the meantime, one of the registered nurses hired by Gulley to work on the evening shift proved unable to function adequately as a registered nurse on the unit. During her period of introductory employment, she simply failed to function as was expected. Since the Hospital had invested a significant amount of money in this individual by putting her through training peculiar to the floor, Gulley decided to move her to the vacant LPN position on the night shift where she was able to function, and to hire another RN to fill the vacancy on the evening shift. (R 287-288) Gulley's inability to achieve precisely what she set out to do (switch a day shift LPN for a night shift RN) is not evidence of pretext. The registered nurse who was moved to the LPN vacancy on the third shift was not capable of performing as expected as a registered nurse but could do the functions required to fill the opening created when Petitioner refused to transfer to the night shift. Moreover, it made economic sense to attempt to salvage the RN in some position which she could perform since the Hospital had invested a great deal of money in her training. In short, there is nothing about this particular matter which would demonstrate pretext.

**1. Review of a factual finding is no basis to grant the writ.**

Petitioner's only real basis for an appeal is her disagreement with the Court of Appeal's conclusion that the District

Court's finding of no discrimination was not clearly erroneous. The Court of Appeals considered *all* the evidence of record, and noted in its opinion that some evidence supported Petitioner's claim of discrimination. *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511 (1985) (review of factual findings is to be made on basis of record in its entirety). However, the Court of Appeals found that the District Court's conclusion had a reasonable basis in the record. The appellate judges specifically found that they had no "definite and firm conviction that a mistake has been committed" in the factual findings. As is apparent from the foregoing, the Court of Appeals committed no error in this review process, and no issue is presented by the Petitioner on this point worthy of a grant of certiorari review.

Petitioner argues briefly that the Court of Appeals should have remanded the case to the District Court for more elaborate factfinding under the authority of *United States Postal Bd. of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1484 (1983). Petitioner has a poor grasp on the appropriate standards of review at issue. In *Aikens*, the district court granted summary judgment in favor of the employer based only on its conclusion that the plaintiff had failed to establish a prima facie case. *See Aikens v. U.S. Postal Bd. of Governors*, 642 F.2d 514 (D.C. Cir. 1980), *vacated* 435 U.S. 902, 101 S.Ct. 3135 (1981), *on remand*, 665 F.2d 1057, (D.C. Cir. 1981), *vacated*, 460 U.S. 711, 103 S.Ct. 1478 (1983). The district court never issued any finding on the ultimate question of discrimination, and this Court correctly took both the district court and the court of appeals to task for this failure to focus on the ultimate question. The reason why a remand was necessary in *Aikens* was because there was *no finding* below on this central issue. *Cf. St. Mary's Honor Center v. Hicks*, __ U.S. __, 113 S.Ct. 2742, 2749 n.4 (1993) (although rejection of the employer's prof-

fered reason is sufficient to support a finding of discrimination, there must be an affirmative finding on this point to enable appellate review). By contrast, the District Court here most clearly found as a matter of fact that Respondent did not discriminate against Petitioner. A full and complete record was available to the Court of Appeals to review this finding, which it did. No remand is necessary or appropriate.

After receiving all of the evidence, including Petitioner's asserted direct evidence of discrimination, the District Court found that the Respondent did not discriminate against the Petitioner on account of her age. The Petition for Writ of Certiorari, in the final analysis, amounts to nothing more than a refined plea for this Court to review the factual findings made below. There is no basis for granting the writ.

## II.

**No evidence was excluded from consideration by either the District Court or the Court of Appeals.**

Petitioner argues that the Court of Appeals wrongfully excluded evidence relating to the Petitioner's prima facie case when considering whether she met her ultimate burden of proving age discrimination. This assertion is flawed for at least two reasons. First, and most simply, neither the Court of Appeals nor the District Court excluded any evidence whatsoever.[2] Indeed, the parties agreed to withhold

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[2] Petitioner's argument that the District Court excluded evidence is based on a hypertechnical dissection of the language in the District Court's findings of facts. The Court of Appeals properly read those findings in a common sense manner, and reviewed them in light of the record as a whole. This was the proper role for the

(continued...)

objections to the admission of evidence based on the fact that this was a bench trial, and in confidence that the magistrate judge could weigh the admitted evidence appropriately without the need for the limiting restrictions typically found in jury trials. The Court of Appeals obviously considered all the Petitioner's evidence, including that relating to her prima facie case, as shown by the following portion of the Court of Appeal's decision:

> Nor is there merit to [Petitioner's] related argument that the court erroneously found that she failed to make out a prima facie case. It is clear (and Proctor admits) that Bybee did make out a prima facie case of discrimination. It is also clear that Proctor articulated a nondiscriminatory justification for its decision: Bybee had the least hospital-wide seniority. The question therefore boiled down to whether the nondiscriminatory reason was pretext, that Bybee was *actually* forced to transfer because the hospital was discriminating against her on the basis of her age. Again, the court made a factual determination that it was not. Bybee's only recourse on appeal therefore is to take issue with this factual finding. And she does.

Order at A-15 (emphasis in original). Petitioner's argument that her prima facie case evidence was not considered in deciding the ultimate issue is not based in reality.

Second, neither this Court nor any court of appeals has ever held, as Petitioner suggests, that evidence supporting a prima facie case is sufficient in and of itself to establish that a proffered non-discriminatory explanation is a pretext for actual discrimination. For the past twenty years, all

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[2] (...continued)
Court of Appeals, even if the language of the District Court was technically imprecise. *See Amadeo v. Zant*, 486 U.S. 214, 228, 108 S.Ct. 1771, 1780 (1988).

courts have understood and followed this Court's simple directive regarding the allocation of burdens of proof in employment discrimination cases:

1. The plaintiff must establish a prima facie case by the preponderance of evidence to survive a directed verdict.
2. The defendant then bears a burden of production only to assert a legitimate, non-discriminatory basis for its employment decision.
3. The burden then shifts to the plaintiff to establish again by a preponderance of the evidence that this asserted reason is a pretext for an actual discriminatory reason for the action.

As this Court explained in the recent *Hicks* case, evidence relating to the prima facie case may permit a trier of fact to infer discrimination *only* when coupled with evidence sufficient to establish by a preponderance that the employer's asserted reason for its employment decision is false. Even then, the circumstantial prima facie case evidence coupled with the evidence of falseness does not *mandate* judgment for the plaintiff. It only presents a dispute for the trier of fact on the ultimate issue of discrimination *vel non*. Petitioner here is attempting to argue that her prima facie case evidence, irrespective of any evidence establishing the falseness of Respondent's asserted reason, or any other evidence of record, mandates judgment in her favor. This is a patently meritless argument, without any support whatsoever. It does not justify the exercise of review by certiorari.

## III.

**This case does not present for the Court's consideration the issue of "pretext plus".**

Petitioner makes a fictitious argument that the Court of Appeals wrongfully required her to present direct evidence

of discrimination. Again, the Court of Appeal's specifically addressed this issue and laid the Petitioner's contention to rest.

> [T]he law acknowledges that it would be very difficult for an employee to put forward direct evidence of her employer's discrimination to be drawn where an ostensibly non-employment decision is shown to be pretextual. The last stage of the *McDonnell-Douglas* analysis thus requires the plaintiff to prove pretext.
>
> A frequently arising question under this analysis is what happens if an employer comes forward with a non-discriminatory justification for its decision, and it turns out that explanation is a lie. The Court in *Hicks* said that proving that the employer is lying is not necessarily enough for the plaintiff to prevail. The factfinder is entitled to infer from the fact that the employer is lying—though it need not—that the actual reason for the decision is discriminatory. . . . It is true that there is some suggestion in *Hicks* that additional evidence of discrimination may be necessary before the factfinder can conclude that the actual reason was discrimination, but in *Anderson* we concluded that this language was dicta, and we therefore ignored it. *Anderson [v. Baxter Healthcare Corp.]*, 13 F.2d [1120,] 1124 n.3 [(7th Cir. 1994)].

Order at A-14. The Court of Appeals clearly did not fault the Petitioner for failing to present evidence of discrimination beyond her attempt to demonstrate pretext. Thus, Petitioner has no legal argument to make on this point. Even if the Courts of Appeals are split over the issue of whether direct evidence is required to prove discrimination, or over the proper interpretation of *St. Mary's Honor Center v. Hicks* (points which Petitioner has not truly demonstrated in her Petition), *the Court of Appeals in this case ruled in Petitioner's favor on this point of law*. Accordingly, this

record in this case does not present for decision the issue which the Petitioner wants the Court to resolve.

## IV.

**The Court of Appeals applied the proper legal standard for determining the sufficiency of the legitimate business reason advanced by the Respondent to explain its actions.**

Finally, the Petitioner attempts to present a "sub-issue" involving the Court of Appeals' standard for establishing pretext. However, the cases cited by Petitioner do not reveal any conflicts between the Courts of Appeals on this issue, and the Seventh Circuit in this case appropriately followed the decisions of this Court in addressing the issue. Accordingly, Petitioner again has failed to present any issue justifying, much less compelling, a grant of the writ of certiorari.

Petitioner argues that the Court of Appeals held that any explanation set forth by an employer mandates judgment in its favor in the absence of direct evidence of discrimination. The Seventh Circuit said no such thing. What the court actually stated was:

> [Respondent] argues that the choice of what type of seniority system to use is a business decision that is not subject to second guessing by the courts. Br. at 20.
>
> This claim overstates its case. If Proctor used hospital-wide seniority, rather than nursing-wide or unit-wide seniority, in order to disadvantage Bybee—and did so on account of Bybee's age—it would have violated ADEA and would be liable for damages. But the hospital is correct in saying that federal law otherwise does not prevent it from adopting whatever type of seniority system it wants. Its decision can be based on legitimate business reasons, on the quirks of its managers, or on the align-

> ment of the stars. But it cannot be a smokescreen for an attempt to discriminate on the basis of age. The ultimate point in this case is that the finder of fact determined that the policy choice represented a legitimate business decision, and was not pretext to disguise discriminatory motivation.

Order at A-16. This analysis is completely consistent with this Court's directives to the courts of appeals dating back to *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576-78, 98 S.Ct. 2943, 2949-50 (1978). In *Furnco*, this Court held that the federal anti-discrimination statutes do not require an employer to use policies that maximize the interests of persons in the protected classes. The statutes only forbid employers from intentionally treating such persons worse than other persons because of their protected status.

> The dangers of embarking on a course such as that charted by the Court of Appeals here, where the court requires businesses to adopt what it perceives to be the "best" hiring procedures, are nowhere more evident than in the record of this very case. Not only does the record not reveal that the court's suggested hiring procedure would work satisfactorily, but also there is nothing in the record to indicate that it would be any less "haphazard, arbitrary, and subjective" than Furnco's method, which the Court of Appeals criticized as deficient for exactly those reasons. Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.
>
> This is not to say, of course, that proof of a justification which is reasonably related to the achievement of some legitimate goal necessarily ends this inquiry. The plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. . . . But the Court of Appeals . . . did not conclude that the prac-

> tices were a pretext for discrimination, but only that different practices would have enabled the employer to at least consider, and perhaps to hire, more minority employees. But courts may not impose such a remedy on an employer at least until a violation of Title VII has been proved, and here none had been under the reasoning of either the District Court or the Court of Appeals.

438 U.S. at 578, 98 S.Ct. at 2950. The Court of Appeals analysis in this case is manifestly faithful to this Court's directives in *Furnco*.

Petitioner nonetheless pleads for certiorari on the grounds that the circuits are split over the proper analysis involved in an employee's attempt to show a proffered business reason for the employment action to be pretext. Petitioner points to two opinions which it contends are in conflict with the Court of Appeals decision below, *Geary v. Visitation of the Blessed Virgin Mary Parish School*, 7 F.3d 324 (3d Cir. 1993) and *DeMarco v. Holy Cross High School*, 4 F.3d 166 (2d Cir. 1993). However, the holdings of these cases are not in conflict with the decision below. In both *Geary* and *DeMarco* the plaintiffs sued religious institutions, claiming age discrimination under the ADEA. The district court in both cases held that the ADEA could not be applied at all to the religious defendants because of the potential for excessive governmental entanglement with religion in contravention of the First Amendment's Establishment Clause. In each case, the court of appeals reversed, specifically because the plaintiffs *could* attempt to establish that the defendants' asserted reasons (even asserted religious reasons) were pretextual *without* showing that the reasons were unwise or implausible (*i.e.*, without calling into question the validity of the employer's religious tenets). For instance, in *Geary*, 7 F.3d at 331-32, the Third Circuit stated:

> Any challenge to the validity or "plausibility" of the religious reason would of course do damage to the protection afforded Visitation School by the First Amendment . . . but Geary might have demonstrated, for example, that similarly [situated] persons had not been fired, that she did not in fact [possess the characteristics on the basis of which defendant claimed it fired her], or that Visitation School's explanation did not emerge until late in the litigation.

Similarly, the Second Circuit stated in *DeMarco*, 4 F.3d 170-71 (citations omitted):

> [I]n applying the *McDonnell Douglas* test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action . . . The pretext inquiry thus normally focuses upon factual questions such as whether the asserted reason for the challenged action comports with the defendant's policies and rules, whether the rule applied to the plaintiff has been applied uniformly, and whether the putative non-discriminatory purpose was stated only after the allegation of discrimination.

These statements are consistent with *Furnco* and with the analysis of the Seventh Circuit in the case below.

Following the quoted passage, the Second Circuit in *DeMarco* did state, "However, in an ADEA or Title VII case, a plaintiff may be able to put into question the genuineness of the employer's putative non-discriminatory purpose by arguing that the stated purpose is implausible, absurd or unwise." *Id.* Although this language is inconsistent with the Seventh Circuit's analysis in this case, it does not constitute

a "circuit split." The Second Circuit did not hold that plaintiff DeMarco had so established pretext, and accordingly, the language in the opinion is mere dicta. Petitioner points to no appellate court opinion upholding a judgment of liability and a finding of pretext on the basis of "implausibility."

In addition to the fact that it is dicta and is focussed on a problem not presented in the case at hand (the potential conflict between the ADEA and the First Amendment in an application to a religious organization as employer), the *DeMarco* language cited above is contrary to this Court's case law. The Second Circuit cited to *Hazen Paper Co. v. Biggins*, ___ U.S. ___, 113 S.Ct. 1701, 1708 (1993) in support of its "implausibility" proposition. However, in *Biggins* this Court actually stated, "[I]nferring age-motivation from the implausibility of the employer's explanation may be problematic in cases where unsavory motives, such as pension interference, were present. This issue is now before us in the Title VII context, see *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (CA8 1992), cert. granted, 506 U.S. ___, 113 S.Ct. 954, 122 L.Ed.2d 111 (1993), and we will not address it prematurely." *Biggins*, 113 S.Ct. at 1708. *Hicks*, on the other hand, contains absolutely no language supporting Petitioner's contention that she should be able to establish pretext by showing that Respondent's seniority policy was "implausible" or "unwise." *Hicks* casts no doubt on the continuing viability of *Furnco*. Rather, *Hicks* repeats the essential basis of a showing of pretext as *falsity* (not "poor judgment," "implausibility," or "anything less preferable to older persons or to the particular plaintiff than is possible under any stretch of the imagination") coupled with, or generating a permissible inference of, actually discriminatory motivation.

In short, the Court of Appeals certainly did not take the absurd position that Petitioner tries to paint in its Petition, that any proffered explanation mandates judgment absent direct evidence of discrimination. The Court of Appeals' opinion below recognized that plaintiff had the opportunity at trial to establish pretext under the proper analysis focusing on truthfulness and discrimination. That analysis is perfectly consistent with the precedent of this Court and with the holdings of the other courts of appeals. Pointing to erroneous dicta in another court's opinion does not constitute a conflict among the circuits sufficient to justify the commitment of this Court's resources on certiorari review.

## CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

ROY G. DAVIS
*(Counsel of Record)*
KECK, MAHIN & CATE
331 Fulton Street
Suite 640
Peoria, Illinois 61602
(309) 673-1681

*Attorneys for Respondent*

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